Filed 6/9/17 P. v. Torres CA1/1

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. MELISSA LINDYLEEANN TORRES, Defendant and Appellant.	A148702 (Contra Costa County Super. Ct. No. 05-152260-6)

INTRODUCTION

The trial court below accepted the parties' stipulation to the truth of a prior conviction allegation, which had the direct consequence of subjecting defendant to greater punishment, without advising her of her trial rights, or eliciting her waiver of those rights, or informing her of the penal consequences of the stipulation. The trial court's acceptance of an unwarned stipulation to the truth of such a prior conviction allegation violated *In re Yurko* (1974) 10 Cal.3d 857 (*Yurko*) and, under the totality of the circumstances here, requires that the stipulation be set aside.

STATEMENT OF THE CASE AND FACTS

An information filed in Contra Costa County charged defendant Melissa Lindyleeann Torres with identity theft with a prior identity theft conviction, a felony. (Pen. Code, § 530.5, subd. (c)(2).)[1] The information also alleged defendant had served

[1] Unless otherwise indicated, all further statutory references are to the Penal Code.

two prior prison terms and was ineligible for probation due to additional prior convictions. (§§ 667.5, subd. (b), 1203, subd. (e)(4).) Defendant pleaded not guilty and denied the allegations. Jury trial commenced March 16, 2016. During trial, the parties stipulated that defendant previously had been convicted by plea of identity theft. On March 21, 2016, the jury found defendant guilty as charged. On May 27, 2016, the court found true the prior prison term allegations and sentenced defendant to county jail for four years.

Underlying Facts of the Offense

We briefly summarize the facts adduced at trial as they are not relevant to the single issue raised on appeal.

On August 29, 2015, police stopped a Honda Accord for Vehicle Code violations on Sunvalley Boulevard in Pleasant Hill. Defendant was a passenger in the car, and police searched a large black handbag on her lap. Inside the handbag the police found personal identifying information for several individuals, including S.P.

S.P. had never met defendant. A notebook found in defendant's possession contained S.P.'s social security number, her date of birth, and other identifying information about her. Shortly after being contacted by police, S.P. learned that two credit accounts had been opened in her name without her permission.

Earlier in the year, on February 27, 2015, at 9:50 p.m., an Antioch police officer had been dispatched to a Mini Storage facility on Sunset Drive, where defendant rented a locker. Defendant and three other people in a Jeep Cherokee were inside the locked facility after closing time. A search of the Jeep and defendant's storage locker yielded credit card machines, mail scanners, credit card readers, check paper, a laminating machine, magnetic readers, financial statements, photocopies of identification cards, mail, and a number of checks bearing the names of other people.

Stipulation

At the close of evidence, the prosecutor advised the court: "Your Honor, there was one more issue before I rest. The parties have come to a stipulation regarding a prior conviction. [¶] The parties stipulate that in Docket Number 4-184059-4, a Contra Costa County case, on or about February 27th, 2015, the Defendant Melissa Torres and Michelle Cannon did wil[l]fully and unlawfully obtain personal identifying information for [K.H.] with the intent to defraud or retain possession of the personal identifying information of 10 or more persons. [¶] The parties hereby stipulate that on April 20th of 2015, the Defendant Melissa Torres entered a plea of no contest to that violation of Penal Code Section 530.5[, subdivision](c)(3), identity theft, fraudulent possession of identification of 10 or more individuals. This plea of no contest was treated as a guilty plea."

"THE COURT: Is that the stipulation, Mr. [H.] [defense counsel]?

"[DEFENSE COUNSEL]: Yes.

"THE COURT: So the record should reflect that the parties have entered that stipulation. [¶] Anything else, Mr. [S.] [prosecutor]?

"[PROSECUTOR]: At this time, the People rest.

"THE COURT: All right. Mr. [H.], any witnesses or evidence for the defense?

"[DEFENSE COUNSEL]: Your Honor, the defense rest[s]. Thank you."

DISCUSSION

The colloquy quoted above contains the sum total of the discussion in the record about defendant's prior section 530.5 conviction.[2] A first conviction for identity theft under this section is a misdemeanor, punishable by fine and/or imprisonment in the

[2] The court later instructed the jury: "During the trial you were told that the People and the defense agreed or stipulated to certain facts. This means that they both accept those facts as true. Because there's no dispute about those facts, you must also accept them as true."

county jail for up to one year. (§ 530.5, subd. (c)(1).) However, if the defendant previously has been convicted of violating this section, a subsequent conviction is punishable by fine and/or imprisonment in the county jail for up to one year, or as a felony, "by imprisonment pursuant to subdivision (h) of Section 1170," that is, by 16 months, two years, or three years in county jail. (§§ 530.5, subd. (c)(2), 1170, subd. (h)(1).) Thus, proof of a prior section 530.5 conviction potentially subjected defendant to additional punishment. And here, in fact, the trial court sentenced defendant to county jail for the midterm of two years on the basis of her prior section 530.5 conviction. Yet she was not advised she had a right to force the prosecutor to prove at a trial before a jury that she suffered the prior conviction, and to confront the witnesses against her at that trial, and to assert her privilege against self-incrimination, with respect to that prior conviction allegation.

Defendant contends the stipulation is invalid—that is, neither voluntary nor intelligent—because she was not advised of and did not personally waive her *Boykin-Tahl*[3] rights to jury trial, confrontation and privilege against self-incrimination as required by *Yurko*, *supra*, 10 Cal.3d 857. Our Supreme Court has recently reaffirmed the importance and necessity of giving such advisements and securing such waivers before accepting a stipulation to " 'the truth of an enhancing allegation where nothing more [is] prerequisite to imposition of punishment except conviction of the underlying offense.' " (*People v. Cross* (2015) 61 Cal.4th 164, 171 (*Cross*), quoting *People v. Adams* (1993) 6 Cal.4th 570, 577.) The court also reaffirmed *Yurko*'s judicially declared rule of criminal procedure requiring that the defendant be advised of " 'the full penal effect of a finding of the truth of an allegation of prior convictions.' " (*Cross*, at p. 170, quoting *Yurko*, at p. 865.) Here, the record is devoid of advisements or waivers. A finding of

[3] See *Boykin v. Alabama* (1969) 395 U.S. 238, 243–244; *In re Tahl* (1969) 1 Cal.3d 122, 130–133.

error is unavoidable. However, "*Yurko* error is not reversible per se. Instead, the test for reversal is whether 'the record affirmatively shows that [the guilty plea] is voluntary and intelligent under the totality of the circumstances.' " (*Cross*, at p. 171, quoting *People v. Howard* (1992) 1 Cal.4th 1132, 1175 (*Howard*).) To the extent the defendant's " 'previous experience in the criminal justice system' " demonstrates his or her " ' "knowledge and sophistication regarding his [legal] rights," ' " it is relevant to the *Howard* inquiry. (*Cross*, at p. 180, quoting *People v. Mosby* (2004) 33 Cal.4th 353, 365 (*Mosby*).)

The Attorney General argues the totality of the circumstances demonstrates the failure to advise was harmless. He gamely asserts this case is more like *Mosby*, where our Supreme Court found harmless error, than it is like *Cross*, where it found reversible error. We find *Mosby* distinguishable and *Cross* on point.

In *Mosby*, *supra*, 33 Cal.4th 353, after learning the jury had reached a verdict, the trial court asked the defendant if he wanted a jury trial on the bifurcated prior conviction allegation. Defense counsel responded that he had spoken to his client, who was willing to waive jury trial and admit the prior offense. (*Id.* at p. 357.) The court advised Mosby that if he were convicted on the charge for which he was on trial, the prior conviction would make him ineligible for probation. The court also advised Mosby that he was "entitled to have this jury determine the truth of the allegation that you suffered this prior felony conviction" and "have the jury hear that and make a decision on whether that's true or not." (*Id.* at p. 358.) Mosby indicated he understood the court's advisements and waived his right to a jury trial. (*Id.* at pp. 357–358.) After the jury returned a guilty verdict, the court further advised Mosby he was "entitled to have the court hear the matter, as well, to make a determination." (*Id*. at p. 358.) Mosby indicated he understood and waived that right, too. (*Ibid*.) The court did not further advise on the right of confrontation or the privilege against self-incrimination. In short, *Mosby* involved a case

of incomplete advisements, rather than a complete failure to advise, i.e., a "[t]ruly silent-record case[]." (*Id.* at p. 361.)

Applying *Howard*'s totality of the circumstances test to the incomplete advisements before it, the *Mosby* court concluded the error was harmless because the court was able to infer from the trial record as a whole that defendant's admission was voluntary and intelligent. "[D]efendant, who was represented by counsel, had *just* undergone a jury trial at which he did not testify, although his codefendant did. Thus, he not only would have known of, but had just exercised, his right to remain silent at trial, forcing the prosecution to prove he had sold cocaine. And, because he had, through counsel, confronted witnesses at that immediately concluded trial, he would have understood that at a trial he had the right of confrontation." The court also factored in the defendant's prior experience pleading guilty. (*People v. Mosby*, *supra*, 33 Cal.4th at p. 364.) However, the *Mosby* court acknowledged that in silent-record cases, where "defendants were not told on the record of their right to trial to determine the truth of a prior conviction allegation," and did not "expressly waive" that right, "we cannot infer that in admitting the prior the defendant has knowingly and intelligently waived that right as well as the associated rights to silence and confrontation of witnesses." (*Id.* at p. 362.)

By contrast, the defendant in *Cross, supra,* 61 Cal.4th 164, like defendant here, underwent a jury trial at which his counsel stipulated to the truth of a prior conviction allegation which potentially exposed him to greater punishment than he otherwise would have faced. (*Id.* at p. 169.) "The trial court accepted this stipulation without advising Cross of any trial rights or the penal consequences of admitting a prior conviction." (*Ibid.*) In finding that the record before it contained "no indication that Cross's stipulation was knowing and voluntary," the court noted that in *Howard* the defendant had been given a partial advisement whereas, in the case before it, "[a]fter counsel read the stipulation in open court, the trial court immediately accepted it. The court did not ask whether Cross had discussed the stipulation with his lawyer; nor did it ask any

questions of Cross personally or in any way inform him of his right to a fair determination of the prior conviction allegation. (Cf. *Mosby, supra,* 33 Cal.4th at pp. 357–358.) The stipulation occurred during the prosecutor's examination of the first witness in the trial; the defense had not cross-examined any witness at that point. (Cf. *id.* at p. 364.) Further, we have no information on how the alleged prior conviction was obtained. (Cf. *id.* at p. 365.) Even if the complaint's express mention of 'Section 273.5([f])(1) of the Penal Code' was sufficient to put Cross on notice of the penal consequence of his stipulation, nothing in the record affirmatively shows that Cross was aware of his right to a fair determination of the truth of the prior conviction allegation. Accordingly, Cross's stipulation must be set aside." (*Cross*, at p. 180.)

In our view, the record in this case similarly fails to disclose a knowing and voluntary waiver of the right to a fair determination of the truth of the prior conviction allegation. As in *Cross*, the court here did not ask whether defendant had discussed the stipulation with her lawyer; nor did it ask any questions of defendant personally or in any way inform her of her right to a fair determination of the prior conviction allegation. The colloquy surrounding the stipulation in this case would not have alerted any reasonable person who was not a lawyer or a judge that the stipulation at issue was the functional equivalent of a guilty plea or entailed the waiver of any rights. Nothing about the colloquy suggested that defendant had any rights with respect to the stipulation, much less the right *not* to stipulate, or the right to a jury trial on the truth of the allegation at which defendant could confront witnesses or refuse to testify. Our view is not altered by the fact that the stipulation occurred at the end of the evidentiary phase of a jury trial, on a charge defendant denied, or by the fact she had previously entered guilty or no contest pleas. Defendant's prior experiences pleading guilty bore little or no resemblance to the stipulation offered here to the court by the prosecutor with defense counsel's assent. Looking at the larger picture, absent *some* context to make sense of a stipulation, the experience of a jury trial, or of entering a guilty plea, the stipulation would not suggest to

a person that she has a right to a jury determination—or any determination at all—on the question whether it is true the defendant previously was convicted of the charge that is the subject of the stipulation. Under these circumstances, we cannot infer that defendant knowingly and intelligently waived her right to "to a fair determination of the truth of the prior conviction allegation." (*Cross, supra,* 61 Cal.4th at p. 180.) Accordingly, defendant's stipulation must be set aside.

DISPOSITION

The judgment affirming the true finding on the prior conviction allegation and imposing a four-year prison sentence is reversed. The matter is remanded to the trial court for further proceedings.

_____
Dondero, J.

We concur:

_____
Humes, P. J.

_____
Margulies, J.